EMPLOYMENT TRIBUNALS

Claimant: Ms A Ginger

Respondent: Department of Work and Pensions

HEARD AT: Bedford ET **ON:** 11th, 12th & 13th July 2016

Huntingdon ET 29th & 30th November 2016
(No parties in attendance)
16th February 2017
(No parties in attendance)

BEFORE: **Employment Judge Ord**

MEMBERS: **Dr S Gamwell**
Mr M Reuby

REPRESENTATION

For the Claimant: Ms C Rayner (Counsel)

For the Respondents: Ms G Parke (Counsel)

JUDGMENT

1. It is the unanimous decision of the Employment Tribunal that the Claimant's complaints that she was the subject of unlawful discrimination on the ground of her sex on 9th April and 15th May 2015.

2. The remaining claims are not well founded and are dismissed.

3. The remedy to which the Claimant is entitled will be determined at hearing on a date to be fixed.

REASONS

Background

1. In all material times the Claimant was (and remains) employed by the Respondent as a Work Coach based at Luton Job Centre. She commenced her employment on 19th July 2009.

2. The Claimant has from time to time since 2013 had various periods away from work for IVF treatment and for reasons relating to subsequent pregnancy/miscarriage.

3. The Claimant underwent IVF treatment in August 2014, subsequently suffering miscarriage/miscarriages. She was absent from work for a period of time thereafter and complained that she was the victim of direct discrimination and/or harassment as set out below. The Claimant referred to eight specific incidents which she says amount individually and cumulatively to direct discrimination and/or harassment. Namely,

    3.1 That on 15th January 2015, her line manager Mr Mills, said at a return to work meeting that, "in order to have a miscarriage your pregnancy must be confirmed".
    3.2 That on 27th January 2015 Mr Mills refused to allow the Claimant's further attendance management review meetings to be conducted by a female manager.
    3.3 That on 27th January 2015, Mr Mills issued the Claimant with a written warning for her absence.
    3.4 That on 9th April 2015 Mr Mills asked the Claimant if she could cope with a second child and whether it was a good idea to have further IVF treatment.
    3.5 That the Claimant was given a "box marking" of 3 as part of her annual review process.
    3.6 That on 11th May 2015 Mr Mills said to the Claimant that "miscarriage is not bereavement".
    3.7 That on 15th May 2015 the Claimant was refused leave on 18th and 19th May 2015 to attend for further IVF treatment.
    3.8 That the Claimant's email query of 18 May 2015 as to the reason for refusal of leave on 15th May was unanswered by Mr Mills.

The Issues

4. The issues for the Tribunal to determine were agreed at a Preliminary Hearing held on 18th December 2015. In relation to each of those eight allegations, the issues were agreed as followed,

    4.1 Was the Claimant treated less favourably by the Respondent because of her sex in relation to all or any of those matters?

4.2 Does the Claimant require a comparator for the purpose of her claim of direct sex discrimination relating to a miscarriage and/or IVF treatment?

4.3 If so, the Claimant relying on a hypothetical comparator, are the relevant characteristics of hypothetical comparator

a) Male who requires leave at short notice for urgent medical treatment, or

b) A male comparator who requires leave of any type for non-urgent medical treatment.

4.4 In the alternative, did the Respondent engage in the conduct alleged?

4.5 If so, was the conduct unwanted by the Claimant?

4.6 If so, did the conduct relate to sex?

4.7 If so, did it have the purpose or effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

4.8 If any unwanted conduct related to sex did have the purpose or effect as set out above, was it reasonable to have that effect, taking into account the other circumstances and the perception of the Claimant?

4.9 Are any or all of the Claimant's claims out of time?

4.10 Do any or all of the allegations made by the Claimant amount to conduct extending over a period within the meaning of Section 123 of the Equality Act 2014?

4.11 If any of the Claimant's claims are out of time and do not form part of conduct extending over time is it just and equitable to extend time?

The Law

5 Under Section 39 of the Equality Act 2010 an employer must not discriminate against an employee by subjecting them to any detriment.

6 Under Section 40 of the Equality Act an employer must not in relation to employment by them harass any person who is an employee of theirs.

7 Under Section 4 of the Equality Act, sex is a protected characteristic.

8 Under Section 13 of the Equality Act, a person discriminates against another because of a protected characteristic they treat that person less favourably than they treat or would treat others.

9 Under Section 46 of the Equality Act a person harasses another if they engage in unwanted conduct related to a relevant protected characteristic and that conduct has the purpose or effect of violating their dignity or creating an intimidating or hostile, degrading, humiliating or offensive environment for them.

10 Under Subsection (4) of Section 26 in deciding whether conduct has the effect referred to the perception of the harassed person, the other circumstances of the case and whether it is reasonable for the conduct to have that effect must be taken into account.

11 In the case of Mayr v Backerei Und Konditorei Gerhard Flocknerohg [2008] IRLR 387, the European Court of Justice determined that the protection against dismissal of a pregnant woman did not extend to a worker who was undergoing IVF treatment but had not yet had the eggs transferred into her uterus. Further in relation to the question of whether or not the dismissal of a worker on the ground that she was undergoing the advanced stages of fertility treatment constituted sex discrimination, the treatment (in that case a follicular puncture and the transfer to the woman's uterus of the ova removed by way of the follicular puncture immediately after their fertilisation) affected only women and it followed that the dismissal of a female worker essentially because she was undergoing that important stage in IVF constituted direct discrimination on the grounds of sex on the basis that articles 2(1) and 5(1) of the Equal Treatment Directive 76/207 precluded that the dismissal of a female worker who is at an advance stage of In Vitro Fertilisation treatment, that is between the follicular puncture and the immediate transfer of the In Vitro fertilised ova into her uterus, insomuch as it is established that the dismissal is essentially based on the fact that the woman has undergone such treatment.

12 According to the Court of Justice of the European Communities in Dekker v Stichting Vormingscentrum Voor Jong Volwassenen (Vjv-centrum) Plus [1992] ICR 325, a decision not to employ a pregnant woman was to be regarded as direct discrimination as only women could be refused employment on the ground of pregnancy. Thus a refusal to employ a woman because she was pregnant amounted to direct sex discrimination.

13 In the case of Sahota v Home Office [2010] ICR 772, the Employment Appeal Tribunal, dismissing an appeal against findings of the Employment Tribunal, considered the case of Mayr and (per curiam) stated that IVF treatment should be treated as equivalent to pregnancy for the purpose of determining whether less favourable treatment of a woman constitutes sex discrimination only for the stage between follicular puncture and immediate transfer of the In Vitro fertilised ova. In reaching that decision the Employment Tribunal considered that wider application of the ruling in Mayr to the effect that any less favourable treatment of a woman on the grounds that she was receiving IVF treatment, constitutes sex discrimination proved "too much" as it would cover any kind of gender specific treatment and would be contrary to the ruling in Handels-Og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening [1992] ICR 332, when the Court of Justice of The European Communities held that, although only female employees were subject to illness attributable to pregnancy or confinement and thereby subject to dismissal on that ground, male and

female employees were, overall, equally susceptible to illness and there were no grounds for distinguishing illness attributable to pregnancy or confinement occurring after the expiry of maternity leave from any other illness. Accordingly, provided a company applied the same criteria to both the male and female employees in respect of dismissal on the ground of illness, the dismissal of a female employee on the ground of illness attributable to pregnancy or confinement did not constitute discrimination on the ground of sex. In a later case, CD v ST [2014] IRLR 551, the Court of Justice of The European Union considered (although the Claimant was unsuccessful in the case) the question of whether a failure to grant leave to a commissioning mother in a surrogacy agreement constituted direct sex discrimination and held that the refusal to provide maternity leave in that situation did not constitute sex discrimination because a commissioning father who has had a baby throughout a surrogacy agreement is treated in the same way as a commissioning mother in a comparable situation (there was no allowance for either to paid leave equivalent to paid maternity leave) so that the refusal of Mrs D's request for maternity leave was not based on a reason that applied exclusively to workers of one sex. It is submitted on behalf of the Claimant here that although that case failed because the reason for the treatment did not apply exclusively to women, it is a restatement of the principal that if the position were otherwise protection against direct discrimination would apply.

14 In the London Borough of Greenwich v Robinson EAT 0745/94, a worker contended that time off for IVF should not count towards sickness absence. The Employment Appeal Tribunal held that infertility was a medical condition, requiring medical treatment and that any absence due to such treatment fell to be treated as sickness absence in the usual way. Whilst IVF treatment was gender specific less favourable treatment on account of gender specific illness did not constitute sex discrimination.

15 Reference was made by the parties to Lyons v DWP Job Centre Plus [2014] ICR 668, where the Employment Appeal Tribunal held that where a pregnancy related illness persisted after the period of maternity leave an employer was entitled to take into account periods of absence due to the illness occurring after the end of the maternity leave when computing a period of absence justifying dismissal and that to do so did not amount to sex discrimination.

16 Richmond Pharmacology v Dhaliwal [2009] ICR 724, confirmed the necessary elements of liability for harassment and in particular that if the form of the harassment is inherently attributable to a protected characteristic it may not be necessary to examine the mental processes of the putative discriminator in order to establish whether the conduct was on the ground of that protected characteristic.

<u>The Hearing</u>

17 During the course of the Hearing we heard evidence from the Claimant and from Mr David Slater (local representative of the Public and Commercial Services Union). On behalf of the Respondent, evidence was called from Andy Mills (at the relevant time the Claimant's line manager); Elizabeth Anne Jones (Higher Executive Officer), and James Snelling (District Operations Manager). Mr Snelling had not been intended to be called as a witness but was called to deal with a matter relating to "box marking". Other than Mr Snelling all witnesses gave their evidence by reference to written witness statements which had been prepared and exchanged. At the conclusion of the Hearing it was agreed that both parties' Counsel would submit closing arguments in writing. The Claimant made closing submissions as did the Respondent and each made subsequent additions/amendments by way of comment on the other's closing submissions. There was reference to a bundle of documents and to a number of authorities which we have referred to above.

The Facts

18 Based upon the evidence presented to the Tribunal we have made the following findings of fact.

19 The Claimant's complaints relate to the period 15th January to 18th May (or a reasonable short period thereafter for a reply to an email) 2015. The Claimant began early conciliation on 10th August 2015. The ACAS early conciliation certificate is dated 22nd September 2015 and the claim was presented to the Tribunal on 21st October 2015.

20 The Claimant began work for the Respondent on 19th July 2009, she remains employed as a Work Coach based at Luton Job Centre. In 2011 she had a successful course of IVF treatment and gave birth to a son.

21 In 2013 the Claimant began a further course of IVF treatment. She advised her, then manager (Ms Brewster) in January 2014 that she was undergoing treatment using donor eggs. In due course this led to an unsuccessful cycle of IVF treatment and the Claimant required a hysteroscopy.

22 In June 2014, the Claimant had a three day absence from work for pregnancy related/childbirth complications. In July 2014, the Claimant joined the work programme team. She began another course of IVF treatment, receiving donor eggs in 2014.

23 The Claimant says that at this time she told her then manager, Mr Mills, that she may need time off at short notice for IVF treatment. Mr Mills did not dispute this and therefore we accept this information was given to Mr Mills.

24 Sadly the Claimant suffered a miscarriage on or about 29th September 2014. She was absent from work thereafter until 14th January 2015.

25 The Claimant says that she suffered a second miscarriage during this period. Apparently a scan taken a few days after her first miscarriage showed that she was still pregnant but she then suffered a further miscarriage, having been admitted to hospital as an emergency, in her words, "a few days later". The precise dates of her admission into hospital and the length of time she was hospitalised were not clear and no documents have been produced in that regard.

26 The Claimant submitted fit notes for the period 29th September 2014 to 4th January 2015. The first fit note covering the period from 29th September to 13th October identified the Claimant's condition as "miscarriage". The second from 13th October for four weeks stated, "miscarriage, heavy bleeding requiring evacuation of retained products of pregnancy". For the period 4th November to 24th November 2014 the reason given for absence on the fit note was "complications due to miscarriage". The note for two weeks from the 25th November referred to "miscarriage complications" but for the period of four weeks from 1st December 2014 the reason for absence was identified as "adjustment disorder following miscarriage".

27 In the meantime the Claimant's absences had triggered the Respondent's absence policy and on 23rd November 2014, as the Claimant had been absent for twenty eight days, she received an invitation to a formal attendance review meeting to be held on 18th November to "discuss progress and what [the Respondent] can do to help [the Claimant] return to work as soon as [she is] able."

28 The meeting took place at a coffee shop. The Claimant was told she could bring a trade union representative or colleague to the meeting and the Claimant was given a copy of the absence management policy. She was told in advance of the meeting that in the event that the Claimant continued sickness absence could not be supported by the Employer her employment could be affected.

29 The meeting was conducted by Mr Hill. He wrote to the Claimant confirming the terms of the discussion and in particular that the Claimant was waiting for a further appointment with her GP following which a possible return to work date would become clearer. He gave the Claimant an opportunity to comment on the terms of his letter (she did not do so) and confirmed that her sickness absence would continue to be supported by the Respondent.

30 On 10th December 2014, the Claimant having been absent for twelve weeks which is another trigger point in the Respondent's procedure, the Claimant was invited to a further formal attendance review meeting. The terms of the letter inviting her to the meeting were identical to the earlier meeting and was to be held on 23rd December 2014 at Luton Job Centre.

31 As well as the impact of the Claimant's condition a discussion took place regarding the Claimant's mother's illness and the impact this was having upon the Claimant. The Claimant said that her doctor was concerned about her "blood levels" but could not explain further. She had not had any blood transfusion. Mr Mills asked that this be clarified after the Claimant's next visit to her GP.

32 The Claimant signed, at Mr Mill's request, a consent form for referral to the occupational health service as part of the Respondent's fit to work plan but would not agree to a copy of the occupational health service report being sent to Mr Mills. On that basis Mr Mills advised that the matter would be referred to his manager, Ms Dale, to determine whether the Claimant's continued absence could be supported.

33 On 6th January 2015, the Claimant's final fit note was issued stating that she would be fit for work from 14th January 2015. No phased return, altered hours, amended duties or other adaptations or changes to the Claimant's working pattern or environment were identified as being necessary. On 8th January 2015, the Claimant's trade union representative advised the Respondent that the Claimant's mother was now in a hospice and asked if the Claimant could take three weeks leave to put in place arrangements for the Claimant's mother.

34 On 15th January 2015 the Claimant had a return to work interview with Mr Mills. The Claimant was recorded as having been absent for forty seven days (her working pattern was three days per week). The notes of the interview indicate that the Claimant

> "…was absent after suffering two miscarriages…first on 28/9 and went to A & E. She was then re-admitted, she believes within two to four weeks (Alison is unsure of the dates and will attempt to get paperwork and discharge notification)".

35 The notes also record that the Claimant was in receipt of counselling for miscarriage/loss and was awaiting bereavement counselling. Mr Mills was to rearrange the occupational health appointment as the first had not taken place due to the Claimant being at the hospice with her mother.

36 It is said by the Claimant that during this meeting Mr Mills said, "In order to have a miscarriage your pregnancy must be confirmed", a comment the Claimant says amounted to direct discrimination on the ground of sex and amounted to an act of harassment.

37 Mr Mills' evidence in relation to this incident was unsatisfactory. In his witness statement as exchanged between the parties in accordance with the directions of the Tribunal he said this,

> "During the meeting I recall saying the statement the Claimant alleges that I said but I said it by way of explanation into why I needed further information from the Claimant."

38 At no stage during the course of the proceedings until Mr Mills gave his evidence was an indication made on behalf of the Respondent that his statement was in any way incorrect.

39 The Claimant was cross examined by the Respondent's counsel without any suggestion that the words had not been said by Mr Mills. On the second day of the hearing, however, when Mr Mills came to give evidence he sought to alter his statement and said that he, "didn't say that" and that his statement had only been seen by him briefly for the first time on the first morning of the hearing.

40 Mr Mills also sought to make an amendment to paragraph 35 of his statement wherein he stated that he was, "not aware the Claimant was undergoing IVF treatment" so that a request she made for leave on 18th and 19th May 2015 was, "totally unexpected". He accepted that he was aware that the Claimant was undergoing further IVF treatment and may need urgent leave for that purpose. He further wished to amend paragraph 17 of his statement regarding his decision to reject the Claimant's request for a female manager to conduct any further meeting as having been "agreed" by a Mr Slater. Mr Mills now stated that Mr Slater had not "agreed" with the decision merely accepted that it was the decision. None of these proposed changes to Mr Mills' witness statement had been notified to the Claimant or her representatives in advance of Mr Mills being called to give evidence and being sworn in as a witness. The Tribunal called an adjournment to allow the Respondent's counsel to take proper instructions. Ms Park, for the Respondent, subsequently addressed the Tribunal in Mr Mills' absence having spoken to her instructing solicitors. She wished to understand fully Mr Mills' position. By consent permission was granted to enable the Respondent's counsel to speak to Mr Mills on this issue only (Mr Mills having been sworn in as a witness but other than to identify the need for amendments in his statement he had given no evidence).

41 After the lunch adjournment, Ms Park, again in the absence of Mr Mills, confirmed that he stood by his amendments. She was given permission to recall both the Claimant and Mr Slater for cross examination.

42 Under renewed cross examination Ms Ginger repeated that Mr Mills had used the words in question on 15 January 2015, pointed out that she had stated this at the hearing of her appeal/grievance against a written warning on 18th August 2015 and emphasised that prior to his using those words the Claimant had not asked for any change of manager to conduct future meetings. Mr Slater also confirmed, as per his witness statement, that Mr Mills used the words and that the Claimant had found them upsetting.

43 Mr Mills was then called back to give evidence and stated that he was "pretty sure" that he had not used the words in question. Under cross examination he could not say what he did say but emphasised that he

was fully aware that the Claimant had had a miscarriage so if the implication of his question was taken to be that he did consider the Claimant had miscarried then that did not in his view make sense.

44 The whole position with regarding Mr Mills' evidence in this area was quite unsatisfactory. The Claimant's case had consistently been that the words had been used, she was supported by Mr Slater in that regard and had raised this very point in her appeal on 15th August. Even after resiling from his admission Mr Mills could not say what he did say and was equivocal as regards the words in question, merely saying that he was "pretty sure" they had not been used.

45 In the circumstances we unanimously concluded the words "in order to have a miscarriage your pregnancy must be confirmed" were said.

46 It is also our unanimous finding of fact that the words were said in the context of Mr Mills seeking further information which the Claimant was to provide about her having had a second miscarriage.

47 On 21st January 2015, the Claimant was assessed by Natasha Stevens, Occupational Health Advisor. The assessment was conducted by telephone. The occupational health assessment recorded that shorter hours were being worked to facilitate the Claimant's return to work and that while she was fit to return to work the Claimant would benefit from a phased/gradual return to work plan, initially working three hours per day and then increasing her hours over a six week period with regular management meetings to monitor her progress to ensure she was coping with the workload and hours. The report records the absence as being "due to some distressing some personal issues and life events" and records the Claimant as having stress reaction "due to recent traumatic events and ongoing personal factors" none of which are detailed in any way.

48 On 22nd January 2015 the Claimant asked Mr Mills that future attendance management review meetings would be conducted by a female manager. The request was refused. It is admitted by the Respondent that the request was made, that it was refused, and that refusal is capable of amounting to less favourable treatment.

49 The request was made in the context of the Claimant having been invited to a meeting on 26th January 2015 because of her absence which meeting would be chaired by Mr Mills.

50 The request was made verbally, either directly to Mr Mills or by leaving a message for him. Mr Mills' evidence was that he considered whether it was appropriate for the matter to be passed to a female manager and discussed the matter with his own line manager, Ms Dale. Mr Mills and Ms Dale took into account that Mr Mills had been managing the Claimant's absence throughout her period of sickness, was fully aware of the case and its sensitivities, had met the Claimant two or three times

already and discussed the matter over the telephone on several occasions. We remind ourselves that at this stage the claimant had not raised any complaint about Mr mills' words or conduct on 15 January 2105. Mr Mills considered that passing the matter to another manager might significantly delay the procedure to allow a new manager to read in to the matter which was not in the Claimant's interests as he considered them. He felt it was, in his words "more appropriate to deal with the matter as soon as possible". Ms Dale had also advised him that his own level of knowledge and involvement in the matter meant it was inappropriate in the case to be passed to another line manager, female or otherwise. On the basis of all the information Mr Mills concluded that passing the attendance management process to a female manager would not be reasonable as he was "fully aware of all the facts and was able to deal with the matter as sensitively as it required".

51 The Claimant said that on receipt of Mr Mills' decision (received via Mr Stringer) she was that "inconsolable and filled with dread about what would happen at [her] attendance management meeting" fearing that she would be "treated in the same way as I was at my back to work meeting". It was Mr Mills' evidence that the Claimant did not, however, appear to be upset by his continuing to hold the next meeting and that he had explained the decision already to Mr Stringer without further complaint. He accepted, however, that Mr Stringer did not "agree" that the decision was correct merely accepted that that was the decision. Mr Mills said that he would have acted in the same way if any staff member made the request. He was fully up to speed on the Claimant's case and felt he was the most appropriate person to deal with the matter. He was not challenged on that evidence.

52 The meeting took place on 26th January. Mr Stringer did not attend with the Claimant, she was accompanied by another representative, Valerie Holman.

53 There was discussion about the calculations upon which the Respondent was relying to calculate the number of day's absence which the Claimant had had. The notes of the meeting indicate that the Claimant had been put forward for extra miscarriage support sessions at the hospital, for which she was awaiting dates. Mr Mills asked that he be kept informed of those dates so that he could look at support that could be offered. Mr Mills also confirmed his awareness of other issues with the Claimant's mother and again asked to be kept informed and said that he and the Respondent would help if they could. He referred her to the help available from both the employer and through the union. Mr Mills drew the Claimant's attention to the suggestion from occupational health that she should have a phased return (although this had not been suggested by her GP nor in the welcome back discussion) and confirmed that would add to the number of sick days on her record but would not be factored into "trigger points". After discussion with her trade union representative the Claimant said she would like to return on part time working but she

would like to discuss that the following day. There was a discussion about the impact of part time working on annual leave.

54 Mr Mills asked for more information on the dates of the miscarriages and Ms Holman questioned the relevance of that. Mr Mills explained that the Claimant had indicated that she had suffered two miscarriages and that sickness rules allow protected periods of two weeks from the date of miscarriage. He wished to have all information available so he could establish whether, in terms, the periods of absence to be deducted amounted to two weeks or, if there were two miscarriages, four weeks. Ms Holman's view was that the guidance on compassionate and/or bereavement should be taken into account and Mr Mills said he was looking at that and other guidance on leave due to IVF and miscarriage.

55 Following the meeting the Claimant was issued with a first written warning for absence. The letter confirmed that the Claimant had discussed problems post miscarriage and the measures she had taken to obtain assistance including attending a support group. The Claimant's mother's illness was also discussed and the letter confirmed that where possible Mr Mills would support the Claimant with those matters. Mr Mills said that he had taken account of occupational health advice and current DWP guidelines and protected periods for miscarriage, IVF treatment and bereavement. The first written warning was issued due to the level of sickness, a six month review period of 26th January to 25th July 2015 was established, with sickness absence of three or more days in the review period being deemed unacceptable which would lead to a further meeting and a possible final written warning.

56 In his evidence before the Tribunal, Mr Slater confirmed that at this time, the Respondent had a "must give a warning" policy in relation to any extended periods of sickness. He confirmed that this was applied across all employees. In his witness statement he described the Claimant as the victim of an "unwritten must give a warning policy of DWP".

57 The Claimant lodged an appeal against or grievance about the first written warning. She did so on a grievance appeal form, stating that her complaint was "on the grounds that special circumstances regarding bereavement have not been fully considered as in section B of the special circumstances of the absence management policy".

58 The Claimant submitted that form on 3rd February 2015 and was then on compassionate leave from 17th February until 18th March due to the illness and subsequent death of her mother.

59 On 7th April 2015 Mr Mills acknowledged receipt of what he described as the Claimant's complaint about the first written attendance management warning describing that as a grievance. He invited the Claimant to a meeting to discuss the complaint. That approach to the claimant's written complaint was not the subject of any criticism or objection by or on behalf of the Claimant.

60 The Claimant says that on 9th April she spoke to Mr Mills saying that she may need time off on short notice for IVF treatment in response to which Mr Mills is alleged to have questioned her ability to cope with a second child and whether it was a good idea to have further IVF treatment.

61 To some extent the Claimant's evidence as regards this matter was inconsistent. Initially she set out in her claim to the Tribunal that the discussion had taken place on 9th April 2015. Her witness evidence was somewhat less precise, stating the conversation had taken place in late March or early April. Her evidence as to where the meeting or discussion had taken place changed from an open plan office to a corner office and then to a simple inability to remember where it had taken place.

62 When Mr Mills witness statement was being prepared the Claimant's allegation which Mr Mills was answering was that this discussion had taken place on 9th April 2015 and he confirmed that he had no notes of the conversation taking place on that day and no recollection of discussing anything with her on that day having been out of the office in the morning and returning in the afternoon.

63 The Claimant could not say with precision when or where this conversation was alleged to have taken place. Mr Mills admitted that the Claimant had said at some stage (although he could not say when) that she was continuing with IVF treatment but this was in passing. He could not say that this occurred on the 9th April or even on whether it took place before or after 9th April, safe to say that he had no recollection of any discussion on 9th April and steadfastly denied questioning the Claimant's ability to cope with a second child and questioning whether it was a good idea to have further IVF treatment.

64 In the circumstances we find on the balance of probabilities, having listened to the evidence of both Ms Ginger and Mr Mills, that Mr Mills did question the Claimant's ability to cope with a second child and that he did he question whether it was a "good idea" for the Claimant to have further IVF treatment. We reach this conclusion because it was around this time that the Claimant disclosed to Mr Mills that she was continuing with IVF treatment. Mr Mills' subsequent approach to her request for leave corroborates the implication in the Claimant's complaint about this conversation, i.e. that Mr Mills was at best ambivalent towards, and at worst critical of her desire to try again for a child. We therefore find as a fact that at the time when Mr Mills was told of the Claimant's intention to undergo further IVF treatment he questioned both the wisdom of her undergoing such further treatment and whether the Claimant was able to cope with another child. Whilst the Claimant could not now state with precision when and where this discussion had taken place, Mr Mills accepted that he had been told that the Claimant was making continued efforts to conceive through further IVF treatment and the reported

response, which we find as a fact was made, was consistent with Mr mills' later approach to the Claimant's later request for short notice leave.

65 The Claimant was on special leave with pay on 20th and 21st April 2015. On 11th May 2015 she met Mr Mills regarding her grievance/appeal against the first written warning.

66 It is during this meeting that Mr Mills is alleged to have stated to the Claimant that "miscarriage is not bereavement".

67 During the course of this meeting, when the Claimant was again accompanied by Ms Holman, the discussion centred around the application of different policies and how they covered (or did not cover) the various periods of absence which had led to the Claimant receiving a written warning. Reference was made to the pregnancy related sickness absence guidance and special leave guidance. Mr Mills said that he had checked the guidance and the rules re: IVF, pregnancy and miscarriage. He said they were clear and that he could find no area where these overlapped or mixed with the bereavement guidance. He denied using the precise words "miscarriage is not bereavement" and said that the Claimant and Ms Holman referred him to the bereavement guidance and said that the Claimant's miscarriage could be looked at under that guidance. Mr Mills' evidence was that he explained that in this instance the pregnancy and miscarriage guidance was very clear and that that was the correct guidance to follow rather than the bereavement guidance. He said that the two guidance policies could not overlap so the bereavement guidance could not be applied. At the request of Ms Holman Mr Mills confirmed that to be the case by telephone call to a representative from Human Resources.

68 We find as a fact that Mr Mills did not use the words "miscarriage is not bereavement". We find as a fact that Mr Mills was referring to the fact that a miscarriage is dealt with under one policy and bereavement is dealt with under another policy and that the two policies do not overlap.

69 Further we find that any words used were clearly being used in the context of which policy was applicable to the Claimant's position. That was the point of her grievance/appeal against the first written warning and that was what Mr Mills was addressing. It could not reasonably be considered that he was making a qualitative assessment of the different levels of trauma or upset that would follow from a bereavement as opposed to a miscarriage. He was directing the Claimant and her trade union representative to the appropriate policy for the Claimant's situation.

70 On 14th May 2015, the Claimant was advised by the Consultant dealing with her IVF treatment (in Athens) that donor eggs had been collected and requiring her to be in attendance in Athens on Monday 18th and Tuesday 19th May. She was asked to be available on Tuesday morning with a preference to be present from Monday midday and it was confirmed that she would be able to fly back on the Tuesday evening.

71 On 15th May the Claimant requested leave for 18th and 19th May. The request was made by telephone. Although Mr Mills in his witness statement said that he was not aware that the Claimant was undergoing IVF treatment at the time, he now agrees that he was so aware.

72 Mr Mills said that he would speak to his deputy in relation to staff levels to see whether the absence could be accommodated and he would revert to the Claimant.

73 Mr Mills says that he checked with his deputy (who holds the leave chart) and as there were training courses scheduled for both days only five members of the team would be in the office on either day. He therefore concluded that he would not be able to accommodate the Claimant's leave request because without her attendance in the office a full and effective service could not be provided by the Respondent. He further said that the Claimant had a number of appointments in her diary and had she been allowed to take the leave requested the customers she was due to see would have been turned away and there would have been no one available to see them for their appointment. He considered whether he could grant the Claimant emergency leave but given that the Claimant had had several days of emergency leave already that year he felt unable to grant emergency leave for that period. Mr Mills said he spoke to Ms Jones prior to communicating the decision and said that he felt he had considered the request fully and was refusing it on the basis of a business need.

74 The Claimant's position is that she was told that the leave request was at too short notice.

75 The Tribunal were taken to the details of the training courses, and it was abundantly clear that there was very little impact on the level of cover in the area where the Claimant was working. There were only three team members on training on one of the days, the training was only for the morning and it did not take place on the second day. Insofar as it was relevant we find as a fact that it would have been possible for the Claimant to take leave on the two days in question without any material impact on the level of service provision which the respondent would be able to give to customers. The claimant said that a number of her appointments could be postponed for a short period if required and those that could not could be (as had happened in the past when someone was absent at short notice) could have been dealt with by other staff members. This evidence was not challenged in any material way and we accept it.

76 The claimant says she was told that the reason given to her for the refusal of leave was that it was at too short notice. We find that Mr Mills failed to take into account the clause in the policy which permits short notice leave to be taken in certain circumstances, specifically stating that each employee would be given the opportunity to take annual leave at

short notice subject only to the needs of the business up to a maximum of three days per quarter. We also find that there was no business reason for the refusal of the Claimant's leave and to refuse the request for lack of notice flies in the face of the purpose of a short notice leave policy. It is not a reason for refusing leave under the policy.

77 The Claimant then on 18th May sent an email to Mr Mills asking for reasons in writing why her leave had been refused. No answer was given. Mr Mills was absent from work for five weeks from 18th May onwards. It is correct that thereafter on his return to work he did not take sufficient notice of the email sent by the Claimant or reply to it. It is equally correct that the Claimant did not do anything to remind Mr Mills of her email or to chase a reply.

78 The urgency for the leave was due to an opportunity for the implantation of donor eggs. The urgency to that extent, had passed. The Claimant did not seek further clarification nor remind Mr Mills of the outstanding email once he returned to work.

79 The Tribunal heard evidence interposed during the course of the hearing from Mr James Snelling in relation to the Claimant's complaint that her rating was reduced from 2 to 3 (requires improvement).

80 For the Claimant's year end appraisal Mr Mills had recommended that she be given a grade 2. Each year there is a "consistency meeting" to ensure that all the line managers are marking their staff to the same standard. For the 2014 – 15 year the consistency meeting took place in April. According to both Mr Snelling and Ms Jones the Claimant's position was compared to two other individuals who were on progression plans which had not progressed to the level expected. They were given a box marking of 3. Other Higher Executive Officers questioned whether the Claimant should also be awarded a 3 but at the meeting it was decided that the Claimant's box marking should remain as a 2 because it could only be based on her performance during her time in the office and the period she was absent could not be taken into account. This was based on, amongst other information, information given by Mr Mills, who was at the meeting.

81 After that meeting had been concluded, however, the markings were sent to Mr Snelling for his review and consideration. Mr Snelling in evidence confirmed what Ms Jones in her witness statement said, namely that there had been a conversation between the two of them and Ms Peck-Cooper; that he had asked whether the Claimant's marking should be reconsidered in the light of box markings given to others and that he considered the Claimant's box marking to be inconsistent with the other members of staff who had "the same training plan in place as the Claimant".

82 There was no training plan in place for the Claimant. That appears to have been overlooked or misunderstood by all of Mr Snelling, Ms Peck-

Cooper and Ms Jones. However, on the basis that Mr Snelling said there was a training plan in place and because Ms Peck-Cooper and Ms Jones did not identify that there was no training plan in place (they may have been unaware of that fact) the three of them agreed that there was "little difference" between the individuals with a box marking of 3 and the Claimant and as such the Claimant should be in the same marking bracket as the other two individuals as her box marking to reduced to 3.

83 By this stage Mr Mills was absent from the office. He had been absent from 18th May onwards. Ms Jones therefore, told the members of Mr Mills' team what their box markings were.

84 Ms Jones told the Claimant that she was to receive a marking of 3 (requires improvement) on 26th May. The Claimant said that she was shocked by this as Mr Mills had told her she would be marked as a two.

85 Although it does not form part of these proceedings the Claimant subsequently raised a grievance against the box marking, which was upheld and a box marking of two was restored. The Claimant complains however, that her being given a box marking of three amounted to an act of discrimination.

Conclusions

86 There are 8 specific allegations upon which the Claimant relies in these proceedings. They are set out in paragraph 3 of this Judgment. Based on our findings of fact it is important to set out the following;

86.1 That we have found as fact that on 15th January 2015 Mr Mills said to the Claimant at a return to work meeting that in order for her to have had a miscarriage her pregnancy must be confirmed.

86.2 That on 27th January 2015 Mr Mills did refuse the Claimant's request to have her further attendance management review meetings to be conducted by a female manager.

86.3 That the Claimant was issued with a written warning for absence on 27th January 2015 by Mr Mills.

86.4 That on a date which cannot now be stated with certainty but which was on or about 9th April 2015 Mr Mills (on learning that the claimant was undergoing further IVF treatment) asked the claimant whether she could cope with a second child and whether it was a good idea to have further IVF treatment.

86.5 That the Claimant was given a box marking of 3 as part of her annual review process.

86.6 On the basis of the findings of facts which we have made, Mr Mills did not say to the Claimant that "miscarriage is not a bereavement".

86.7 The Claimant was refused leave on 18th May to attend for further IVF (pursuant to a request on 15th May).

86.8 That the request from the Claimant as to the reason for refusal of leave addressed to Mr Mills was not answered.

86. In relation to the complaint at 3.6 and 86.6 above, therefore (the allegation that Mr Mills had said to the Claimant that "miscarriage is not a bereavement") that claim is not made out and fails. We have found, as facts, that the comment alleged to have been on 11th May 2015 was not made. In relation to that claim we have reached further conclusions which are set out below.

87. Accordingly, whilst (other than as set out above) the factual basis of each claim is not in dispute, it is a question for the Tribunal as to the context in which the events occurred, whether they were on the grounds of the Claimant's gender/pregnancy/maternity related matters and/or whether they amounted to acts of harassment.

88. The first complaint relates to a statement on 15th January 2015 made by Mr Mills that in order to have a miscarriage the Claimant's pregnancy had to be confirmed.

89. We have found as a fact that those words or words sufficiently close to conveying exactly the same meaning, were said by Mr Mills on that day. Mr Mills' evidence in this area was, as we have set out in our fact finding, unsatisfactory and included an admission which he then sought to resile from at the very last moment.

90. What Mr Mills said in his witness statement, and what we find to be the case, however, was the basis upon which the comment was made. The Claimant had suffered a miscarriage. On her fit notes provided by her general practitioner it referred to miscarriage, subsequent heavy bleeding requiring evacuation of "retained products of pregnancy" and subsequent "complications due to miscarriage". The Claimant said, in terms, that one of these complications was that she had suffered two miscarriages, one within 2 to 4 weeks of the other. Mr Mills was concerned to ensure that any leave which could be properly accounted for under the various policies operated by the Respondent (which includes allowing 2 weeks absence following miscarriage) should be properly applied to the Claimant to the extent the Claimant said she had suffered 2 miscarriages some weeks apart. The Claimant's position was unusual and Mr Mills, we find and conclude, was seeking clarity to enable him to properly apply the relevant policies.

91. We are bound to add that the Claimant was not offering assistance either to Mr Mills then or to the Tribunal now to enable an understanding of what had actually occurred when the Claimant was readmitted to hospital. The fit note refers to the evacuation of retained products of pregnancy. It gives no further information. The relevant dates when the Claimant was readmitted into hospital and subsequently discharged from it, and the precise reason for that admission (which the Claimant says was a second miscarriage) have not been disclosed. In those

circumstances Mr Mills was explaining why he needed the relevant information which was not because he was challenging whether or not the Claimant had been pregnant, but because he was seeking to establish whether the Claimant was entitled to only one or, as she claimed, two periods of absence for reasons relating to miscarriage(s). Indeed the notes of the meeting record that, setting out that the Claimant was absent after suffering two miscarriages, the second "she believes within 2 to 4 weeks" with an indication that the Claimant would seek to get paperwork and discharge notes from the relevant hospital.

92. The discussion at which the words were said took place on the 15th January 2015 and the Claimant's first miscarriage was on the 28th September 2014. The second was "within 2 to 4 weeks" and taking the longest period would have therefore occurred on 26th October 2015. The discussion took place over 11 weeks later and thus was outside any protected period (there is no claim brought under S:18 of the Equality Act relating to pregnancy and maternity discrimination) nor does this fall within the *Mayr* exception.

93. We have considered whether in these circumstances a comparator is required. Clearly only a woman can suffer a miscarriage so the construction of a hypothetical male comparator is a highly artificial one. The Respondent suggests that an appropriate comparator is a man working in circumstances where his employer's policies allowed him a period of absence after his wife suffered a miscarriage and who was stating that she had suffered 2 miscarriages. The Claimant says that the way Mr Mills dealt with these absences and the way he spoke to her about the miscarriages was indicative of a total lack of interest in or concern for her or the health/fertility issues she was dealing with. It was said that Mr Mills would not have made these enquiries "for any other employee and would not have done so in the case of a man who was in hospital for any reoccurring illness" (para 126 of the Claimant's Counsel's written submissions).

94. We have two issues with that submission. First if the Claimant says that he would not have done this for "<u>any</u> other employee" (emphasis added) then that suggests that it was a specific question targeted at and a lack of sensitivity shown towards the Claimant as an individual and not because of her gender because "any other employee" includes other women. So far as the second part of that submission is concerned, we do not accept that a man, hospitalised for a recurring illness, is an appropriate comparator because this was not a "recurring illness" this was a two part episode, on the Claimant's case of miscarriage of two implanted embryos. It was not "recurring" in the true sense of a recurring illness.

95. We have concluded that whilst the words used by Mr Mills may be described as clumsy, they did not amount to less favourable treatment within the meaning of S:13 of the Equality Act 2010. Mr Mills was seeking to establish, with a degree of precision (and he was entitled so

to do) the dates upon which the Claimant suffered what she said was a second miscarriage together with confirmation that that had indeed occurred. He was doing so for reasons which in fact were to the Claimant's potential benefit and were necessary because of the length of time (and the imprecise statement of the length of time) between the two incidents of miscarriage. That was the reason why the questions were asked and thus the reason for the "treatment" upon which the Claimant relies namely the use of the specific words.

96. Further we find that the context in which this statement was made were such whilst the Claimant might have considered them upsetting they did not amount to a violation of her dignity nor did they create an atmosphere which was intimidating, hostile, degrading, humiliating or offensive for her. We are obliged under S:26(4)(b) and (c) to take into account not only the Claimant's perception but also the other circumstances of the case and whether it is reasonable for the conduct complained of to have the effect of amounting to harassment. The last of those, whether it is reasonable for the conduct to have that affect, must be viewed objectively and in this case we do not consider it reasonable for the conduct to have that effect given the precise context in which it took place which we have set out at length.

97. Accordingly, whilst we find as a fact that the words complained of by the Claimant were used by Mr Mills, they did not amount to less favourable treatment nor did they amount to an act of harassment for the reasons we have set out above.

98. We have not at this stage dealt with the issues of jurisdiction/time limits for that complaint. Given the findings which we have made, it is not necessary to do so but we will deal with our conclusions on jurisdictions/limitation at the end of this Judgment.

99. The second complaint relates to Mr Mills' refusal to allow the Claimant's further attendance management review meetings to be conducted by a female manager.

100. It is not in dispute that the Claimant made that request nor is it in dispute that it was refused. During the course of cross examination, Mr Mills accepted that the request was not an unreasonable one. However, that is not sufficient to establish the refusal as either an act of direct discrimination or an act of harassment.

101. The refusal took place on 27th January 2015 and is thus outside any protected period whether under the Equality Act or *Mayr*. Accordingly a hypothetical comparator is required, no actual comparator having been identified.

102. We conclude that an appropriate comparator would be a man with a gender specific medical issue who did not wish to discuss it with a female manager because of what he considered to be a previously

displayed lack of sensitivity by that female manager towards the condition which the hypothetical comparator was suffering from.

103. In order to establish a claim for direct discrimination, however, the Claimant must satisfy us on the balance of probabilities that the reason for the less favourable treatment (that treatment being the continuation by Mr Mills of his consideration of the Claimant's meetings, and the refusal to hand the matter over to a female manager) was because of a protected characteristic. The protected characteristic relied upon is the Claimant's gender.

104. We do not find that this part of the claim has been made out. The reasons given by Mr Mills for not referring the matter to a female manager were in part assumption (in particular he assumed that it would result in delay but he did not properly investigate whether such delay would in fact occur) but in other respects reasonable. In any event his assumption was not, we find based on the evidence presented, for any gender specific reason nor because of the cause of the claimant's absence which was under review. Rather he came to the conclusion he did (after discussion with his own manager), because he had conducted previous discussions with the Claimant, was in a good position to continue to do so and considered on his evidence that he had dealt with matters satisfactorily and sensitively. It should be born in mind that neither in the request for a female manager nor in any response to Mr Mills' refusal of the request, did the claimant indicate that the reason for the request was a perceived lack of sensitivity on Mr Mills' behalf nor was any complaint raised about the words allegedly used at the previous meeting so Mr Mills could not have taken into account any such issue as he was wholly unaware of it.

105. The fact that the Claimant's request was, as Mr Mills indicated, a reasonable one, does not mean that his refusal of it was unreasonable let alone an act of discrimination. The reasons given by Mr Mills for rejecting the proposal were, we find, his genuine reasons even though at least in part (as to delay) he was mistaken. His decision was not taken for any reason connected to the gender of the Claimant nor for the reasons relating to the nature of the Claimant's absence or the circumstance that had led to it but rather because Mr Mills considered that in all of the circumstances it was better for him to carry on with those discussions (a view supported by his own, female, Manager).

106. Whilst the Claimant may have found that decision upsetting and may have been concerned as to how the future meeting with Mr Mills would go, we do not consider that the decision would objectively amount to harassment. There had been no complaint raised about the previous meeting or the words used in it. Had there been, Mr Mills may have taken a different view (but that is speculation). In those circumstances we do not find that it has been established that the conduct in question could objectively have the effect of violating the Claimant's dignity or

creating for her an intimidating hostile, degrading, humiliating or offensive environment.

107. On that basis that claim fails on its merits, and as with the first allegation we will deal with jurisdiction issues at the end of the Judgment.

108. The third allegation is that on the 27th January 2015 Mr Mills issued the Claimant with a written warning for her absence.

109. It is not disputed that that took place. The Claimant says that this was an act of direct discrimination or an act of harassment. However, Mr Slater's evidence in this area was telling. Called on behalf of the Claimant and having acted as her Trade Union representative during the period in question, Mr Slater says that the Claimant was the victim of a "must give a warning" policy which was prevalent but unwritten during the time in question within the Respondent's undertaking. That evidence was not challenged by the Respondent and we find that it amounts to a clear indication that the reason why the Claimant was given a warning was because of the length of her absence and the inflexible application of the policy that a warning must follow after a period of absence over a certain number of days, irrespective of the circumstances. It cannot be said, therefore, that the Claimant has been the victim of less favourable treatment because of her gender nor that it could amount to an act of harassment because it does not relate to a protected characteristic.

110. That claim is therefore not made out, and again there are jurisdictional issues which we will deal with at the end of this Judgment.

111. We have found as a fact that the allegation that on 9th April 2015 Mr Mills questioned the Claimant's ability to cope with a second child and whether it was a good idea for her to have further IVF treatment has been made out. The Claimant has satisfied us on the balance on probabilities that that event occurred. Such a comment could only be made to a woman. A man does not undergo IVF treatment in the same way as a woman does. We find that Mr Mills would not have made that comment to a man who was seeking to father a second child (by whatever means) either as to the wisdom of undertaking any further attempts at parenthood or in relation to his ability to cope thereafter. We say that because we are satisfied that the words were illustrative of Mr Mills' attitude towards the claimant and in particular her efforts to have a second child together with the need for her to have additional leave for that purpose. The statement was, we conclude, directed at the Claimant because of her gender and amounted to less favourable treatment. A man would not have been spoken to by Mr Mills in that way.

112. In relation to allegation number 5, the fact that the Claimant was given a box marking of 3, not 2, the evidence of Ms Jones and Mr Snelling are clear. Mr Mills told the Claimant that she would get a box marking of 2. He gave her a box marking of 2 and at the subsequent consistency

meeting the Claimant's marking was confirmed as 2 for the reasons we have set out in the earlier parts of this Judgment.

113. The reason why that marking moved from 2 to 3 was because Mr Snelling was concerned, and raised in a subsequent discussion with Ms Jones and Ms Peck-Cooper, that the Claimant's mark was inconsistent when compared to two other individuals who were on a training plan. None of the individuals concerned understood that there was no training plan in place for the Claimant (and it was not explained why they thought a training plan was in place). However, it was because of that, and for no other reason, that the Claimant's mark was adjusted from 2 to 3. It did not relate to her gender nor was it because of any protected characteristic. It cannot therefore amount to an act of either direct discrimination (because it was not because of a protected characteristic) nor an act of harassment (because the conduct did not relate to a relevant protected characteristic). The action took place purely because of a misunderstanding between Mr Snelling, Ms Jones and Ms Peck-Cooper as to the existence or otherwise of a training plan in place for the Claimant.

114. On that basis allegation 5 fails on its merits. Whilst the Claimant was given a box rating of 3 it was not for a reason which related to, nor was it because of her gender but came about because of a misunderstanding of the existence of a training plan when in fact no such plan was in place for the claimant. We note with interest that it was Mr mills who had been advocating the retention of the marking of 3 at the previous meeting.

115. The sixth allegation was that the Claimant was told on the 11th May 2015 at a meeting to discuss the first written warning which had been issued to her for attendance that "miscarriage is not a bereavement".

116. We have already found as a fact that those words were not used but that Mr Mills was referring to the two different policies (special leave following miscarriage and bereavement leave) and indicating that the two were different.

117. In any event we do not find that drawing that distinction can amount in any way to less favourable treatment. The Claimant was seeking to implement the bereavement policy rather than the policy relating to leave following miscarriage, or possibly in addition thereto. Mr Mills was emphasising that that was not the way the policies worked and that an employee is entitled to a period of special leave of two weeks following a miscarriage. Thus, in the event that the Claimant had suffered two miscarriages she would have been entitled to four weeks leave under the relevant policy but the relevant policy in the circumstances of a miscarriage was not the bereavement policy. The fact that there are two distinct policies relating to on the one hand miscarriage and on the other hand bereavement is clear evidence as Mr Mills was seeking to emphasise, that the two are treated differently by the Respondent in relation to the provision of special leave.

118. We have not been specifically invited to consider whether, whatever words were used, Mr Mills was sufficiently insensitive in his wording so that his comments still amounted to harassment even if the precise words complained of were not used. For completeness sake, however, we are satisfied that no words were used which could amount to harassment. It is noteworthy that the Trade Union representative who attended that meeting with the Claimant did not give evidence in support of the Claimant's allegation, it is further relevant that there are no contemporaneous notes made of this event, nor that there was any contemporaneous complaint made if, as the Claimant now says, this amounted to conduct which she characterises as harassment. It is correct that the Claimant became upset during the meeting but that was because she was having to discuss (for quite proper reasons) matters which were obviously personally sensitive and deeply upsetting for her. We cannot find, on the evidence that has been presented to us, that the conduct of Mr Mills at the meeting on 11th May 2015 amounted to less favourable treatment nor harassment as the entire thrust and purpose of the meeting was to consider the Claimant's application to overturn the first written warning, given because of the number of day's absence, with her seeking to rely upon both the bereavement and the miscarriage policies with Mr Mills explaining why one applied but not the other. Indeed we not that the Claimant did not 9and has not at any stage, including before us) provided details such as the dates of admission to and discharge from hospital together with any relevant medical notes or records which would establish that she had indeed suffered a second miscarriage, which – had it been provided to Mr Mills – would have immediately put an end to the line of enquiry and would have concluded the issue of how much special leave (which would not be taken into account for any absence warning procedures) the claimant was entitled to.

119. Accordingly the precise allegation made by the Claimant is not made out on the facts. The discussion related to the application of one policy over another and the difference between the two. Such a conversation could not properly be considered to be an act of harassment and as the Claimant has not satisfied us on the balance of probabilities that any words were used which would amount to harassment, this allegation fails.

120. The Claimant was refused leave at short notice to travel to Athens for IVF treatment. The factual basis for allegation 7, is therefore made out. It is accepted by the Respondent that this is capable of amounting to less favourable treatment, and could amount to unwanted conduct.

121. We find that this incident falls outside any protected period or exception under *Mayr*. The purpose of the treatment was for the implantation of donor eggs. The refusal took place 3 days before that proposed implantation.

122. We agree with the Respondent that the appropriate comparator would be a man in the same situation as the Claimant who sought at short notice, leave for non essential medical treatment.

123. Again the question which we find to be determinative in relation to this allegation is the reason for the treatment. The treatment was the refusal of holiday at short notice. Mr Mills gave a number of reasons for it, in part relating to others having been refused leave at the same time, in part because of an inability to cover the Claimant's position at short notice, in part because of training courses which were being held. None of those reasons were sustainable in the face of even the most cursory analysis. We do not find that they were the reasons why the leave was refused. We accept that the claimant was in fact told that the reason her request for short notice leave was refused was because she had not given sufficient notice. Clearly, Mr Mills failed to have due regard to the policy on short notice leave and made assumptions regarding levels of cover and absences through training which were wholly incorrect. He knew the Claimant was undergoing IVF treatment, he knew she would require short notice leave as a result and that Respondent's policy in this area is effectively in favour of granting such leave on occasions unless it cannot be accommodated for business reasons. There were no business reasons preventing the granting of leave. Mr Mills could not justify the alleged business reasons he was relying on. They simply did exist as even the most cursory enquiry would have revealed. We conclude that the reason why the Claimant was refused short notice leave can be found in Mr Mills' attitude to the Claimant's desire to undergo further IVF treatment – he questioned whether it was sensible or whether the Claimant could cope. Accordingly when short notice leave was sought he found a reason – a reason which was wholly false – to refuse that leave. We conclude that had the leave been for another reason he would have made more careful enquiry of the alleged business needs. Had he done so he would have found that it was perfectly possible to grant leave. He did not do so because of the reason the leave was being sought. That clearly relates to the Claimant's gender because a man does not need to attend at short notice for treatment of this type and amounts to less favourable treatment. Given the history of the matter which was well known to Mr Mills and given his knowledge of the reason why leave was being sought it was an act of harassment which we conclude violated the Claimant's dignity and created a humiliating environment for her. In effect, Mr Mills was through his decision determining whether or not the Claimant could have the best possible chance of a successful IVF cycle.

124. We find Mr Mills' statement that he would have refused anyone leave at that time if it was applied for on short notice to be a case of trying to "close the stable door". We conclude from the facts that we have established, that had a request been made to Mr Mills for leave for a different reason at short notice he would have been more alert to and taken more care to properly investigate whether there was any business need which would justifiably lead to the leave being refused.

Accordingly, the treatment afforded to the Claimant was because of and related to the Claimant's gender. The reason why the leave was refused was because of the reason why the leave was sought, with Mr mills questioning both the wisdom of the claimant's continued use of IVF and her ability to "cope" with a second child in the event that her treatment had been successful.

125. The final allegation is again on its facts not in dispute. The Claimant sent an email to Mr Mills asking for the written reasons why the leave had been refused. No reply was forthcoming.

126. It is also not in dispute that Mr Mills was absent from work, for reasons which were not disclosed to us, for a period of 5 weeks commencing that day. Accordingly it would not have been until the beginning of July Mr Mills would have first seen that email.

127. The Claimant did not suggest that she was unaware of Mr Mills' absence. The allegation is precise, it is the fact that Mr Mills did not reply to the email rather the Respondent generally did not reply to it. Thus any reminders or prompts that were sent to other members of the Respondent team do not, in our view, touch and concern the allegation in question which was that Mr Mills himself did not reply.

128. By the time Mr Mills returned to work he said that he did look at his emails but that he overlooked this matter.

129. We have not been able to conclude that Mr Mills did so intentionally, let alone that he did so intentionally because of the Claimant's gender. He had been absent from work for a number of weeks and the urgency of the matter had long passed.

130. Whilst the Claimant may have found this frustrating or irritating or otherwise concerning she did not find it sufficiently so to make enquiries of others to ascertain whether they could provide the reason for the refusal of leave nor did she raise it with Mr Mills on his return to work. We do not find, therefore, that the failure to reply to the email had the effect required to amount to harassment within the meaning of S:**?**6 of the of the Equality Act 2010.

131. Therefore the claims set out at paragraphs 3.4 and 3.7 succeed on their merits. The remaining claims fail.

132. The claim in relation to the events of 9th April 2015 (paragraph 3.4) is on the face of it out of time. It occurred 4 months and 1 day before the early conciliation information was provided to ACAS.

133. We find, however, that that claim is brought in time as it was part of a continuing series of acts or conduct extending over a period, to use the words of the statute, the last of which (the refusal of leave) took place on 15th May 2015 within 3 months of the commencement of the early

conciliation process on 10 August 2015. The two claims which have succeeded are connected acts so as to amount to conduct extending over a period, the Claimant first being questioned as to the wisdom of and her suitability for further IVF treatment and her ability to cope in the event of a successful outcome and the second being a refusal of leave which was sought specifically to attend for such treatment. They were clearly connected and part of the same thought process in Mr Mills' mind. Accordingly the claim in relation to the events of 9th April 2015 is brought in time as is the complaint regarding the refusal of leave on 18 May.

134. The remaining complaints (paragraphs 3.2, 3.2 and 3.3) which are on their face out of time have failed on their merits. Had they not so failed, however, we would not have extended time to allow them to proceed. The comment allegedly made by Mr mills on 15 January 2015 (the first complaint) was specific to the discussion at the time and not part of a series of acts which would amount to conduct extending over a period. It related to, and only to, the matters under discussion that day. Nor was the single, specific, act of refusing the request to hand matters over to a female manager part of conduct extending over a period. It was a single managerial decision which we do not find was connected to the other complaints brought so as to amount to conduct extending over a period. Equally, the issue of the written warning for absence (complaint 3.3) was a single managerial decision which was solely based on the number of days' absence. It was not part of a course of conduct / conduct extending over a period.

135. Accordingly the Claimant's complaints of discrimination referred to in paragraphs 3.4 and 3.7 above succeed. The remainder of the claims fail on their merits and are dismissed.

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Employment Judge Ord, Bedford

Date: 19 April 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS